

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JUL 28 2010

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD HERTZ,

Defendant.

CR-10-098-RMP

PLEA AGREEMENT

Plaintiff, United States of America, by and through James A. McDevitt,  
United States Attorney for the Eastern District of Washington, Joseph H.  
Harrington, Assistant United States Attorney for the Eastern District of  
Washington, Thomas E. Perez, Assistant Attorney General for the Civil Rights  
Division of the U.S. Department of Justice, and Benjamin J. Hawk, Trial Attorney  
for the Civil Rights Division of the U.S. Department of Justice, and Defendant,  
DONALD HERTZ, and his counsel, Dustin Deissner, agree to enter into the  
following Plea Agreement:

1. Transfer of Venue:

DONALD HERTZ acknowledges that he has been charged by way of a two-

1 count Indictment, dated August 25, 2009, in the District of Colorado, and that he  
2 has consented to transfer the case to the Eastern District of Washington, pursuant  
3 to Rule 20 of the Federal Rules of Criminal Procedure, for entry of guilty pleas and  
4 sentencing. DONALD HERTZ understands that, pursuant to Fed. R. Crim. P.  
5 20(c), should he enter a plea of not guilty to either of the charged offenses, the case  
6 shall be transferred back to the District of Colorado for trial.

7       2.     Plea and Maximum Statutory Penalties:

8       DONALD HERTZ agrees to plead guilty to Counts One and Two of the  
9 Indictment. Count One charges him with Interference with Freedom of Access to  
10 Reproductive Health Services, in violation of 18 U.S.C. § 248(a)(1). DONALD  
11 HERTZ understands this charge is a Class A misdemeanor offense that carries a  
12 maximum statutory penalty of: not more than a one-year term of imprisonment; not  
13 more than a \$100,000 fine; not more than a one-year term of supervised release;  
14 and a \$25 special assessment fee. DONALD HERTZ also understands the Court  
15 may impose an order of restitution, if any.

16       Count Two charges him with Interstate Transmission of Threatening  
17 Communications, in violation of 18 U.S.C. § 875(c). DONALD HERTZ  
18 understands this charge is a Class D felony offense that carries a maximum  
19 statutory penalty of: not more than a five-year term of imprisonment; not more  
20 than a \$250,000 fine; not more than a three-year term of supervised release; and a  
21 \$100 special assessment fee. DONALD HERTZ also understands that the Court  
22 may impose an order of restitution, if any.

23       3.     Consecutive Sentences and Violations of Supervised Release:

24       DONALD HERTZ understands that the Court has the authority to impose  
25 consecutive sentences for each conviction, which sentences he would have to serve  
26 one after the other. DONALD HERTZ also understands that a violation of a  
27 condition of supervised release carries an additional penalty of re-incarceration for  
28 all or part of the term of supervised release, without credit for time previously

1 served on post-release supervision.

2 4. The Court Is Not a Party to this Plea Agreement:

3 DONALD HERTZ and the United States understand that the Court is not a  
4 party to this Plea Agreement and may accept or reject it. DONALD HERTZ also  
5 understands: that sentencing is a matter within the sole discretion of the Court; that  
6 the Court is under no obligation to accept any recommendations made by the  
7 United States and/or by DONALD HERTZ; that the Court will obtain an  
8 independent report and sentencing recommendation from the U.S. Probation  
9 Office; and that the Court may, in its discretion, impose any sentence it deems  
10 appropriate up to the statutory maximum penalty.

11 DONALD HERTZ acknowledges that no promises of any type have been  
12 made to him regarding the sentence that the Court will impose in this matter.  
13 DONALD HERTZ understands that the Court is required to consider the  
14 sentencing range applicable under the Sentencing Guidelines, but that the Court  
15 may depart upward or downward from the range.

16 DONALD HERTZ also understands that the Court may not accept any of the  
17 parties' recommendations set forth in this Plea Agreement. DONALD HERTZ  
18 understands further that such a circumstance does not provide him a basis for  
19 withdrawing from this Plea Agreement or for withdrawing either of his pleas of  
20 guilty.

21 5. Waiver of Constitutional Rights:

22 DONALD HERTZ understands that by entering a plea he is knowingly and  
23 voluntarily waiving certain constitutional rights, including: (a.) the right to a jury  
24 trial; (b.) the right to see, hear, and question the government's witnesses; (c.) the  
25 right to remain silent at trial; (d.) the right to testify at trial; and (e.) the right to  
26 compel witnesses to testify. While DONALD HERTZ understands he is waiving  
27 certain constitutional rights, he also understands that he will retain the right to be  
28 assisted through the sentencing process and the appellate process, if any, by an

1 attorney, who will be appointed at no cost to him if he cannot afford to hire an  
2 attorney.

3 6. Elements of the Offenses:

4 DONALD HERTZ acknowledges and agrees that, in order to be found guilty  
5 of 18 U.S.C. § 248(a)(1), as charged in Count One of the Indictment, the United  
6 States would have to prove each of the following elements beyond a reasonable  
7 doubt:

8 First, DONALD HERTZ used or threatened the use of force;

9 Second, DONALD HERTZ intentionally injured, intimidated, or  
10 interfered with the victims, or attempted to do so; and

11 Third, DONALD HERTZ acted because the victims were or had been,  
12 or in order to intimidate the victims from, providing  
13 reproductive health services.

14 DONALD HERTZ further acknowledges and agrees that, in order to be  
15 found guilty of 18 U.S.C. § 875(c), as charged in Count Two of the Indictment, the  
16 United States would have to prove each of the following elements beyond a  
17 reasonable doubt:

18 First, DONALD HERTZ intentionally transmitted a communication  
19 in interstate commerce;

20 Second, The communication contained a threat to injure a person; and

21 Third, DONALD HERTZ acted with the specific intent to threaten.

22 7. Factual Basis and Statement of Facts

23 DONALD HERTZ acknowledges and agrees that, in proving the elements of  
24 the crimes to which he is pleading guilty, the United States can establish the  
25 following facts beyond a reasonable doubt, that these facts constitute an adequate  
26 basis for his pleas of guilty, and that for sentencing purposes, neither party is  
27 precluded from presenting additional facts and arguing the relevance of the facts to  
28 the Sentencing Guidelines computation or to sentencing generally, unless

1 otherwise prohibited by this Plea Agreement:

- 2 (a.) On May 31, 2009, George Tiller, a physician who provided  
3 reproductive health services, was shot and killed.
- 4 (b.) The Defendant, DONALD HERTZ, learned of Dr. Tiller's death from  
5 media sources. The Defendant also learned from the media that some  
6 of Dr. Tiller's patients began obtaining reproductive health services  
7 from the Boulder Abortion Clinic (Clinic), which is operated by W.H.  
8 and located in Boulder, Colorado. The Defendant used an information  
9 service to obtain the telephone number for the Clinic.
- 10 (c.) On June 23, 2009, the Defendant, while located in Spokane,  
11 Washington, used a telephone to communicate to an employee of the  
12 Clinic, who was located in Boulder, and thereby intentionally  
13 transmitted a communication in interstate commerce. In an effort to  
14 conceal his identity, the Defendant dialed \*67 before calling the Clinic  
15 in order to prevent his caller identification information from being  
16 obtained by the Clinic.
- 17 (d.) During the telephone call to the Clinic, the Defendant, by threat of  
18 force, intentionally intimidated and interfered with W.H. and the  
19 employees of the Clinic because they were, and in order to intimidate  
20 them from, providing reproductive health services. Specifically, the  
21 Defendant communicated to an employee of the Clinic that two of the  
22 Defendant's acquaintances were driving from Spanish Fork, Utah, to  
23 Boulder to kill members of W.H.'s family in order to make W.H.  
24 suffer because of his work at the Clinic. The Defendant knew the  
25 employee would communicate this threat to W.H. The Defendant  
26 intended for this threat to scare W.H. and the employees of the Clinic  
27 and to intimidate them so that they would stop providing abortions.
- 28 (e.) The Defendant's threat to injure W.H.'s family did in fact intimidate

1 and interfere with W.H., W.H.'s family, and the employees of the  
2 Clinic. W.H. and his family feared for their own lives and the lives of  
3 each other. The Defendant's threat greatly disrupted their lives.  
4 Additionally, the employees of the Clinic feared for their own lives  
5 and the lives of each other and were impacted by the Defendant's  
6 threat.

7 8. Waiver of Inadmissibility of Statements:

8 DONALD HERTZ agrees that, if he withdraws either of his guilty pleas, he  
9 waives the inadmissibility of statements, if any, made in the course of plea  
10 discussions with the United States, pursuant to Fed. R. Crim. P. 11(f). DONALD  
11 HERTZ agrees further that any such inadmissible statements also include those  
12 statements made at the change of plea hearing to establish facts sufficient for the  
13 Court to accept his plea. DONALD HERTZ agrees that this waiver permits the  
14 United States to move for the introduction into evidence of any such inadmissible  
15 statements in its case-in-chief.

16 9. Effect of Breach:

17 DONALD HERTZ agrees if he breaches this Plea Agreement: that the Plea  
18 Agreement is null and void; that the time necessary to process the Fed. R. Crim. P.  
19 20 consent to transfer is excludable under the Speedy Trial Act; that he expressly  
20 waives the right to challenge the initiation of additional charges against him for  
21 any criminal activity; and that the United States may make derivative use of and  
22 may pursue any investigative leads suggested by him.

23 10. United States Sentencing Guidelines Calculation:

24 The United States and DONALD HERTZ acknowledge that the final  
25 Sentencing Guidelines calculations will be determined by the Court, with input  
26 from the U.S. Probation Office. The United States and DONALD HERTZ reserve  
27 the right to advise the Court and the U.S. Probation Office about the law and facts  
28 applicable to any sentencing issues.

1           (a.) *Base Offense Level*

2           The United States and DONALD HERTZ agree: that the base offense level  
3 for Count One is 12, U.S.S.G. §§ 2H1.1(a)(1) and 2A6.1; that the base offense  
4 level for Count Two is 12, U.S.S.G. § 2A6.1; and that the adjusted offense level  
5 after grouping is 12, U.S.S.G. § 3D1.2.

6           (b.) *Acceptance of Responsibility*

7           If DONALD HERTZ pleads guilty and demonstrates a recognition and  
8 affirmative acceptance of personal responsibility for his criminal conduct, provides  
9 complete and accurate information during the sentencing process, and does not  
10 commit any obstructive conduct, the United States will recommend a two-level  
11 reduction of his adjusted offense level for acceptance of responsibility. The  
12 resulting offense level would be 10.

13           DONALD HERTZ agrees to pay the \$25 mandatory special assessment for  
14 Count One and the \$100 mandatory special assessment for Count Two to the Clerk  
15 of the Court for the Eastern District of Washington before sentencing, and shall  
16 provide a receipt from the Clerk to the United States before sentencing as proof of  
17 this payment, as a condition of this recommendation by the United States. 18  
18 U.S.C. § 3013. If DONALD HERTZ lacks the financial resources to pay the  
19 assessment at or before sentencing and if he is placed in a Bureau of Prison facility  
20 to serve any term of incarceration imposed by the Court, he agrees to participate in  
21 the Bureau of Prison's Inmate Financial Responsibility Program in order to pay the  
22 assessment.

23           DONALD HERTZ and the United States also agree that the United States  
24 may, at its option and upon written notice to DONALD HERTZ, not recommend a  
25 reduction for acceptance of responsibility if, prior to the imposition of sentence, he  
26 is charged with or convicted of any criminal offense whatsoever and/or if he tests  
27 positive for any controlled substance.  
28

1           (c.) *Criminal History*

2           DONALD HERTZ and the United States understand that his criminal history  
3 computation will be determined by the Court, based on input from the U.S.  
4 Probation Office and the Presentence Investigation Report. DONALD HERTZ and  
5 the United States acknowledge they have made no agreement and have made no  
6 representations as to the Criminal History Category within which DONALD  
7 HERTZ will be placed.

8           11. Incarceration:

9           The United States agrees not to oppose a request by DONALD HERTZ that  
10 he be permitted to serve any term of incarceration imposed by the Court in home  
11 detention, so long as any such request comports with the Sentencing Guidelines.  
12 DONALD HERTZ and the United States acknowledge that they are otherwise free  
13 to make whatever sentencing recommendations concerning incarceration that they  
14 deem appropriate.

15           12. Criminal Fine:

16           DONALD HERTZ and the United States reserve the right to make whatever  
17 recommendation(s) they deem appropriate concerning the imposition of a criminal  
18 fine.

19           13. Supervised Release:

20           DONALD HERTZ and the United States reserve the right to make whatever  
21 recommendation(s) they deem appropriate concerning the imposition of a term of  
22 supervised release.

23           14. Payments While Incarcerated:

24           If DONALD HERTZ lacks the financial resources to pay any monetary  
25 obligations imposed by the Court, including any fine and/or restitution, and if he is  
26 placed in a Bureau of Prison facility to serve any term of incarceration imposed by  
27 the Court, he agrees to participate in the Bureau of Prison's Inmate Financial  
28 Responsibility Program to earn money to pay toward any such obligations.

1           15.   Additional Violations of Law Can Void Plea Agreement:

2           DONALD HERTZ and the United States agree that the United States may, at  
3 its option and upon written notice to DONALD HERTZ, withdraw from this Plea  
4 Agreement or renegotiate its recommendations if, prior to the imposition of  
5 sentence, he is charged with or convicted of any criminal offense whatsoever or if  
6 he tests positive for any controlled substance.

7           16.   Waiver of Appeal Rights:

8           DONALD HERTZ acknowledges that his guilty pleas are unconditional and  
9 that, upon entry of those pleas pursuant to this Plea Agreement, he waives the  
10 appeal of all pending pretrial issues, if any, arising in this case. On the condition  
11 that the Court imposes a custodial sentence that is within or below the Guidelines  
12 sentencing range (or any statutory mandatory minimum sentence if greater) as  
13 determined by the Court, DONALD HERTZ agrees to waive: a) any right  
14 conferred by 18 U.S.C. § 3742 to appeal the sentence imposed, including any  
15 restitution order and b) any right to seek a reduction of sentence or other attack of  
16 the conviction or sentence, including but not limited to proceedings pursuant to 28  
17 U.S.C. § 2255 (Writ of Habeas Corpus), except as any such attack directly relates  
18 to the effectiveness of his legal representation. The United States and DONALD  
19 HERTZ agree and acknowledge that this waiver does not preclude DONALD  
20 HERTZ from seeking relief under 28 U.S.C. § 2241 to address the conditions of  
21 his confinement or the decisions of the U.S. Bureau of Prisons regarding the  
22 execution of his sentence. Nothing in this Plea Agreement precludes the United  
23 States from opposing any such request for relief.

24           Should the conviction(s) be set aside, reversed, vacated, or dismissed, this  
25 Plea Agreement is null and void and the United States may institute or re-institute  
26 any charges against DONALD HERTZ and make derivative use of any statements  
27 or information he has provided.

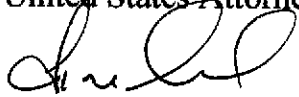
17. Integration Clause:

DONALD HERTZ and the United States acknowledge that the above-stated terms and conditions constitute the entire plea agreement between the parties and deny the existence of any other terms or conditions not stated herein. The parties agree this Plea Agreement is binding only upon the United States Attorney's Office for the Eastern District of Washington and the Civil Rights Division for the United States Department of Justice, and cannot bind other federal, state, or local authorities. The parties also agree that this agreement cannot be modified except in a writing that is signed by the parties.

Approvals and Signatures

Agreed and submitted on behalf of the United States Attorney's Office for the Eastern District of Washington and the Civil Rights Division of the U.S. Department of Justice.

James A. McDevitt  
United States Attorney

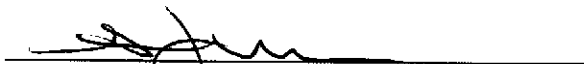


7/28/10

~~Joseph H. Harrington~~ AINE Ahmed  
Assistant United States Attorney

Date

Thomas E. Perez  
Assistant Attorney General



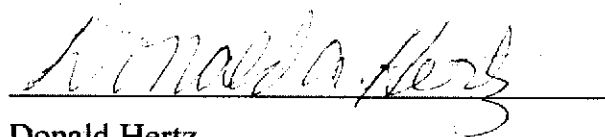
~~Benjamin J. Hawk~~ Stephen Curran  
Trial Attorney

July 28, 2010

Date

I have read this Plea Agreement and have carefully reviewed and discussed every part of the agreement with my attorney. I understand and voluntarily enter

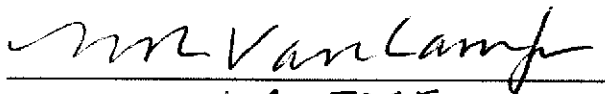
1 into this Plea Agreement. Furthermore, I have consulted with my attorney about  
 2 my rights, I understand those rights, and I am satisfied with the representation of  
 3 my attorney in this case. No other promises or inducements have been made to me,  
 4 other than those contained in this Plea Agreement and no one has threatened or  
 5 forced me in any way to enter into this Plea Agreement. I am agreeing to plead  
 6 guilty because I am guilty.

7 

8  
 9 Donald Hertz  
 10 Defendant

  
 Date

11 I, Russell Van Camp, hereby acknowledge that I am counsel for DONALD  
 12 HERTZ in the above-captioned case. I have read the Plea Agreement and have  
 13 discussed the contents of the agreement with my client. The Plea Agreement  
 14 accurately and completely sets forth the entirety of the agreement between the  
 15 parties. I concur in my client's decision to plead as set forth in the Plea Agreement.  
 16 To the best of my knowledge, DONALD HERTZ has no viable defense to the  
 17 instant charge and there is no legal reason why the Court should not accept his  
 18 pleas of guilty.

19 

20  
 21 Russell Van Camp WA 5385  
 22 Attorney for the Defendant

  
 Date